SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. .....

Hastings Manufacturing Company,
a Michigan corporation,
Petitioner,

v.

Federal Trade Commission,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The opinion in the Circuit Court of Appeals for the Sixth Circuit is, as yet, unreported. It was rendered February 4, 1946, and will be found on pages 785 to 796 of the Record.

Jurisdiction

1. The date of the judgment to be reviewed is February 4, 1946.

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C.A. Sec. 347 (a); and the Act of September 26, 1914, 38 Stat. 717, 719-721, as amended by Act of March 21, 1938, 52 Stat. 111-114, and by Sec. 1107 (f) of Act of June 23, 1938, 52 Stat. 1028, 15 U.S.C.A. Sec. 45, known as the Federal Trade Commission Act.

3. The nature of the case, the judgment of the Circuit Court of Appeals for the Sixth Circuit, and the reasons why a writ of certiorari should be granted are summarized or set forth in the foregoing petition. The Circuit Court of Appeals has in this case "decided an important question of federal law which has not been, but should be, settled by this Court" (Supreme Court Rule 38 (5) (b)).

Statement of the Case

This has already been stated in the preceding petition under I (pp. 1-5), which is hereby adopted and made a part of this brief.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the practices of granting "obsolescence" protection, guarantee of profits, and loans to jobbers, as employed by petitioner, constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act.

2. The Circuit Court of Appeals erred in not holding that in the light of existing competitive conditions the practices of granting "obsolescence" protection, guarantee of profits and loans to jobbers, did not constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the provisions of the Federal Trade Commission Act.

3. The Circuit Court of Appeals erred in holding that the Federal Trade Commission had authority to issue a second complaint containing identical charges and covering the exact same period of time as a former complaint against the same respondent which, after hearing, it had dismissed "without prejudice."

ARGUMENT

A. Petitioner's Policy of Granting "Obsolescence" Protection, the Guarantee of Profits, and Loans to Its Jobbers, Did Not Constitute an Unfair Method of Competition in Commerce and an Unfair or Deceptive Act or Practice Within the Meaning of the Federal Trade Commission Act.

With but few exceptions the courts have not expanded the doctrine of unfair trade to include any practice in which there is not fraud or deceit, palming off or passing off. None of these elements is present here. *Kinney-Rome Co. v. Comm'n.*, (CCA 7, 1921), 275 F. 665; *Queen Manufacturing Co. v. Isaac Ginsberg & Bros.* (CCA 8, 1929), 25 F. (2d) 284; *Ford Motor Co. v. Comm'n.* (CCA 6, 1941), 120 F. (2d) 175. As was said in *Northam Warren Corporation v. Comm'n.* (CCA 2, 1932), 59 F. (2d) 196, 198,

> "In order that the Commission proceed in the public interest the courts have insisted not only upon a showing that the practice is unfair and disapproved, but also that the public are misled thereby."

In the cases which the Commission has considered involving "lifting" of competitors' products, this requirement has been observed. *Waldes & Co., Inc.,* 8 F.T.C. 305; *R. M. Hollingshead Corp.,* Docket No. 3661 (CCH Trade Reg. Service, par. 6430.40); *F.T.C. v. Charles Tager,* Docket No. 1025 (CCH, par. 6430.40); *National Cash Register Co.,* Docket No. 1328 (CCH, par. 6430); *Reifschneider Paint & Glass Co.,* Docket No. 1716 (CCH, par. 6430.40). In no case decided by the Commission or any court has the practice been held unfair in the absence of palming off, or disparagement or demoralization of the competitive market by reselling at cut prices.

What constitutes unfair competition is a question of law which must ultimately be determined by the courts. *Federal Trade Commission v. Gratz,* 253 U.S. 421, 427; *Federal Trade Commission v. Curtis,* 260 U.S. 568, 579-580.

B. In the Light of Existing Competitive Conditions Petitioner's Practices of Obsolescence Protection, Guarantee of Profits, and Loans to Jobbers Did Not Constitute Unfair Methods of Competition in Commerce and Unfair or Deceptive Acts or Practices Within the Provisions of the Federal Trade Commission Act.

It has always been the general practice in the piston ring industry for a manufacturer to take back for credit or exchange for new rings any of its rings (including "overage") in the hands of a jobber actively representing it, regardless of whether the rings were of a current

or outmoded type. However, when a jobber discontinued a line of rings or a manufacturer cancelled a jobber's contract and "pulled" its line, only the consigned stock of its rings would be taken back by the manufacturer, thus leaving the jobber to "swallow" any rings of its make owned outright by him (R. 279-280; 325; 351; 391-2; 473; 493; 505; 519). Hastings, on the other hand, whenever it discontinued doing business with a jobber, regardless of whether Hastings or the jobber took the initiative in terminating the relationship, always took back all of its rings in the hands of the jobber, whether part of his consigned stock or owned outright by the jobber, and paid him his cost in cash for those rings (C.E. 169; R. 280, 582).

Competitive manufacturers repeatedly threatened to pull and did pull their line or cancel their contracts if a jobber took on or refused to give up the Hastings' line (R. 213; 217; 310-11; 331; 461; 524; 578). In order to meet this situation, petitioner, about 1936, established a general policy of protecting all its jobbers against loss by reason of that jobber discontinuing a competitive line of rings or by reason of a competitor manufacturer pulling its line when the jobber took on or refused to give up the Hastings line. In a few instances, petitioner guaranteed a jobber that his gross profit from Hastings rings would exceed by a specified per cent that of a preceding year with a competitive line. In every instance where such an offer was made it was to meet the threat of a competitive manufacturer to pull its line (R. 754-5).

Neither the Commission nor the Circuit Court of Appeals took into consideration the existence of this competitive situation. It was not included in the Commission's findings. It was not mentioned in the Court's opinion. This was clearly error. *Ford Motor Co. v. Comm'n.* (CCA 6, 1941), 120 F. (2d) 175, 181. The

Supreme Court, in *Federal Trade Comm'n. v. Curtis,* 260 U.S. 568, 580, said that "the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission."

It is submitted that the practical result of the rule laid down by the Circuit Court of Appeals is to restrict competition and foster monopoly. Until petitioner offered "obsolescence" protection, a jobber was compelled to decline to take on Hastings rings even as a side-line in order to preserve his own investment in the line of rings he was then handling. Manufacturers by threatening to pull their line and leave the jobber to swallow his "overage" relied on this situation to prevent the introduction on the market of Hastings' new "Steel-Vent" ring. The practice employed by petitioner encouraged competition. It permitted the jobber to make a decision as to what line or lines he would carry without fear of loss by reason of the practices of competitor manufacturers. In no case did the jobber receive from Hastings more than his inventoried cost of the competitive rings taken up, which was exactly what he would have received had he remained or been allowed to remain a representative of the competitor manufacturer. Without this practice of petitioner's, the availability to the public of this superior type of ring, now copied by all the leading manufacturers, might have been indefinitely postponed or even prevented entirely. Where the distribution of a device, such as Hastings' new ring, must be made through a jobber organization, public interest demands that that field be open and not closed. Petitioner submits that its practices have in them no unfairness in the sense that they tend to destroy competition or create a monopoly. Their tendency and their result are directly the opposite. They foster and are a necessary part of fair competition in the piston ring industry.

C. The Federal Trade Commission Has No Authority to Issue a Second Complaint Containing Identical Charges and Covering the Exact Same Period of Time as a Former Complaint Which, After Hearing, it had Dismissed "Without Prejudice."

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes . . ."—*Arrow-Hart & H. Co. v. Commission*, 291 U.S. 587, 598.

In *Federal Trade Commission v. Western Meat Co.*, 272 U.S. 554, at 559, this Court said,

> "Without doubt the Commission may not go beyond the words of the statute properly construed, but they must be read in the light of its general purpose and applied with a view to effectuate such purpose."
>
> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial functions."—*Federal Trade Commission v. Eastman Co.*, 274 U.S. 619, 623.

There is no authority for what the Commission did here either in the Federal Trade Commission Act or in the Commission's own rules.

Sec. 5 (b) of the Federal Trade Commission Act provides:

> ". . . After expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of

> the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section."

Section 2.26 of the Commission's Rules of Practice provides:

> "In any case where an order to cease and desist has been issued by the Commission, the Commission may . . . (b) in the case of an order dismissing at any time thereafter, give reasonable notice to all respondents and to all intervenors, if any, of a hearing as to whether the said proceeding shall be reopened. If after said hearing the Commission shall have reason to believe that conditions of fact or law have so changed since the said order was made as to require, or that the public interest requires, the reopening of such proceeding, the Commission will issue an order for the reopening of the same."

Had the Commission followed the only procedure authorized by the statute and its own rules, your petitioner would then have had an adequate remedy by appearing and showing cause why the threatened reopening order should not be entered, and, if the reopening were ordered, by bringing action in the Circuit Court of Appeals to have the order set aside. See also, *Royal Baking Powder Co. v. Federal Trade Commission*, 32 F. (2d) 966, cert. denied, 50 S. Ct. 28. In the instant case no semblance of the required procedure was followed. What was done

permitted the Commission arbitrarily to accomplish the identical result and at the same time deprive your petitioner not only of notice and opportunity to be heard, but also of its statutory right to review any adverse order of the Commission in the Circuit Court of Appeals. Petitioner submits that the limitations placed upon the arbitrary exercise of authority and jurisdiction by the Commission cannot thus be circumvented, especially where to do so destroys the safe-guards to petitioner's rights provided by law.

> "An order of dismissal finally disposes of the proceeding subject to power of the Commission to reopen the proceedings if change in law or fact or public interest warrant it."—Beer, *Federal Trade Law and Practice*, Sec. 123D, page 413.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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